Mustaza bin Abdul Rahman v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-06A(SH)-2–01 OF 2018
YAACOB MD SAM, ZABARIAH MOHD YUSOF AND RAVINTHRAN JJCA
7 SEPTEMBER 2020

Criminal Procedure — Appeal — Appeal against conviction and sentence — Offences relating to terrorism — Conviction under ss 130J(1)(b), 130M and 130J(1)(a) — Appellant sentenced to 12 years imprisonment for each offence and terms of imprisonment to run concurrently — Identity of appellant — Whether appellant gave support to terrorism activity — Whether appellant legally bound to give information — Whether 'Ikhwah Anshar Daulah Islamiyah' a terrorist organisation — Whether 'Baiah' posted on the Telegram chat group valid — Criminal Procedure Code s 13(1) — Penal Code ss 130J(1)(a), (b) & 130M — Police Act 1967 ss 3(3), 20(3)(a) & (b)

The appellant was charged with committing three offences relating to terrorism under ss 130J(1)(b) ('the first charge'), 130M ('the second charge') and 130J(1)(a) ('the third charge') of the Penal Code. The appellant was said to have committed the offences when he suggested in a *Telegram* chat group named 'Amanah (Phb) v Pas' ('the chat group') that an attack be carried out on gambling establishments after the administrator of the chat group Akhi Wandy announced that a night club known as Kelab Movida in Puchong was bombed. He had also also posted an oath of allegiance known as 'Baiah' in Arabic pledging loyalty to the 'Ikhwah Anshar Daulah Islamiyah' group on the chat group. The appellant's nickname in the chat group was 'Mustidan Di' and this was later confirmed by SP8 who was from the Celcom telecommunications company and SP5 who was from the Maxis telecommunications company. The conversations in the chat group was preserved and printed out by ST1 and the same was given to the police and tendered as evidence by the prosecution. The trial court granted 'protected witness' status to ST1 under s 6 of the Security Offences (Special Measures) Act 2012 ('the SOSMA'). In relation to the 'Baiah', the expert witness ('SP7') testified that the said 'Baiah' was valid, but the appellant called SD3 and SD4 to challenge this evidence. In relation to this issue, SD4 stated that in his opinion the oath was not valid as it was not made in person before a representative of the Caliph. At the end of the trial, the appellant was convicted on all three charges. He was sentenced to 12 years imprisonment for each of the three charges and all the terms of imprisonment were to run concurrently. In the present appeal the appellant submitted that: (a) the prosecustion failed to prove that 'Mustidan Di' was the appellant and the learned trial judge had failed to give sufficient consideration to the unsworn

statement of the appellant that he lost his two hand phones between February and April of 2016 and that his hand phone was hacked; (b) 'Mustidan Di' did not give support for the bombing of the Movida night club in Puchong; (c) the element of the offence that the appellant was 'legally bound to give information' to the authorities was not proved; (d) the prosecution failed to prove that organisation known as 'Ikhwah Anshar Daulah Islamiyah' was a terrorist organisation; and (e) the 'Baiah' oath which was posted on the chat group was not a valid oath and therefore the charge that the appellant gave support to a terrorist group was baseless.

Held, affirming the conviction on the first charge and the third charge, setting aside the conviction on the second charge, and reducing the sentence of imprisonment of 12 years on the first charge and the third charge to ten years:

(1) The learned High Court judge had correctly directed himself by referring to well established precedents that an unsworn statement which was not subject to cross-examination could not be given the same weight as sworn testimony. The learned High Court judge had given the unsworn testimony such weight as it deserved by looking at other evidence tendered in the case. The appellant's defence that the hand phones were lost and or they were hacked was kept up his sleeve until the trial commenced. This fact went to the issue of the credibility of the defence and the weight that should be attached to the unsworn statement. In the present case, the prosecution had proved that 'Mustidan Di' was the appellant through the evidence of ST1, the evidence of the Maxis and Celcom officers and the discovery of the *Telegram* account name 'Musdetitan' in the hand phone seized from the appellant. In the premises, the omission of the prosecution to call expert evidence on the technical workings of the *Telegram* application did not occasioned any gap in the prosecution's case (see paras 25–29).

(2) 'Support' for a terrorist group or the commission of a terrorist act was defined very widely in s 130J of the Penal Code. In the present case, after one member of the chat group gleefully posted news about the successful commission of a violent act in the name of a terrorist cause, the appellant advocated the commission of further violent acts. In the premises, although there was no evidence of the involvement of the appellant in the Movida bomb attack, his act in advocating further attacks clearly came with the wide definition of 'giving support' for the commission of terrorist acts (see paras 30–31).

(3) The third charge stated that the appellant committed the offence between March and June of 2016, that was, before the amended s 13(1) of the Criminal Procedure Code came into force. Therefore, the new provision could not aid the prosecution in this case to establish the element of 'legally bound'. The learned High Court judge relied on ss

3(3) and 20(3)(a) and (b) of the Police Act 1967 (Revised 1988) as the appellant was a policeman but in the present case, no evidence was tendered to the effect that the appellant who was a police mechanic was tasked with gathering intelligence about terrorism cases. Therefore, he had no duty to report information that he was privy to by virtue of being a member of the chat group to his superiors. In the premises, the conviction under s 130M of the Penal Code could not be sustained (see paras 38–40).

(4) There was no error in the finding of fact of the learned High Court judge that Ikhwah Anshar Daulah Islamiyah was terrorist group. He based his finding on the opinion evidence of SP7 and the inference he drew from the nature of the discussion in the chat group. SD3 who worked in the same university as SP7 told the court that the latter did not teach a course known as 'Revealed Knowledge and Human Science' but this issue was never put by the defence to SP7 whenever he was cross-examined. In the premises, this evidence was correctly discounted by the learned High Court judge (see para 45).

(5) There was no error in the decision of the High Court judge who accepted the opinion of SP7 in preference to the opinion of SD4. The High Court judge took into account the experience of SP7 in studying the Islamic State and Ikhwah Anshar Daulah Islamiyah and the fact that he was given access to the entire printout of the conversations in the chat group. Therefore, SP7 would have been in a better position to gauge the intention of the members who posted the online 'baiah' oath when he prepared his expert report. On the other hand, SD4 only had access to the charge sheet and had no opportunity to study the conversations in the said chat groups (see para 46).

(6) The offence disclosed in the third charge was that the appellant gave 'support' to a terrorist organization. If a person takes the 'baiah' oath and considers himself bound to give allegiance to a terrorist organization, he has committed an offence under s 130J(a) of the Penal Code. It is trite that intention is a matter of inference. In the present case, the appellant posted the lengthy 'baiah' oath in the midst of discussions about raising funds for the Islamic State and the Ikhwah Anshar Daulah Islamiah. Thus, the appellant clearly evinced his intention to support the said terrorist organizations by posting the 'baiah' oath. Therefore, the legality of the 'baiah' oath from the standpoint of Islamic jurisprudence or practice was not the essential ingredient of this offence. But the fact that one considered himself bound by the 'baiah' oath was the essential ingredient. Therefore, there was no error in the finding of fact of the learned High Court judge that the 'baiah' oath posted by the appellant constituted support for the Ikhwah Anshar Daulah Islamiyah which was a terrorist group (see para 47).

(7) The mitigating factors that were canvassed on behalf of the appellant were not given consideration. Further, in the table reflecting the trend of sentencing for the s 130J(1)(a) offence that was tendered by the prosecution, the punishment ranged between eight years imprisonment to ten years imprisonment. In the premises, the court reduced the sentence of imprisonment of 12 years on the first charge and the third charge to ten years (see para 49).

[Bahasa Malaysia summary

Perayu dituduh melakukan tiga kesalahan yang berkaitan dengan keganasan di bawah ss 130J(1)(b) ('tuduhan pertama'), 130M ('tuduhan kedua') dan 130J(1)(a) ('tuduhan ketiga') Kanun Keseksaan. Perayu dikatakan telah melakukan kesalahan tersebut apabila dia mencadangkan dalam 'chartgroup' *Telegram* bernama 'Amanah (Phb) v Pas' ('chat group tersebut') agar serangan dilakukan di tempat perjudian setelah pentadbir chat group tersebut Akhi Wandy mengumumkan bahawa sebuah kelab malam yang dikenali sebagai Kelab Movida di Puchong telah dibom. Dia juga telah memberikan sumpah setia iaitu 'Baiah' dalam bahasa Arab yang bersumpah untuk setia kepada kumpulan 'Ikhwah Anshar Daulah Islamiyah' di dalam *chat group* tersebut. Nama panggilan perayu dalam *chat group* tersebut adalah 'Mustidan Di' dan ini kemudian disahkan oleh SP8 yang bekerja di syarikat telekomunikasi Celcom dan SP5 yang bekerja di syarikat telekomunikasi Maxis. Perbualan dalam *chat group* tersebut disimpan dan dicetak oleh ST1 dan yang sama diberikan kepada polis dan dimasukkan sebagai keterangan oleh pihak pendakwaan. Mahkamah bicara memberikan status 'saksi terlindung' kepada ST1 di bawah s 6 Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 ('Akta'). Berkaitan dengan 'Baiah', saksi pakar ('SP7') memberi keterangan bahawa 'Baiah' tersebut adalah sah, tetapi perayu memanggil SD3 dan SD4 untuk mencabar keterangan ini. Berkaitan dengan isu ini, SD4 menyatakan bahawa pada pendapatnya sumpah tersebut tidak sah kerana tidak dibuat secara langsung di hadapan wakil khalifah. Pada akhir perbicaraan, perayu disabitkan bersalah atas ketiga-tiga tuduhan. Dia dijatuhkan hukuman penjara 12 tahun bagi setiap pertuduhan dan pemenjaraan berjalan serentak. Dalam rayuan ini, perayu berhujah bahawa: (a) pihak pendakwaan gagal membuktikan bahawa 'Mustidan Di' adalah perayu dan hakim bicara yang bijaksana telah gagal memberikan pertimbangan yang cukup terhadap pernyataan tidak bersumpah oleh perayu bahawa dia kehilangan dua telefon bimbitnya antara Februari dan April 2016 dan telefon bimbitnya telah digodam; (b) 'Mustidan Di' tidak memberikan sokongan terhadap pengeboman kelab malam Movida di Puchong; (c) unsur kesalahan bahawa perayu 'terikat secara sah untuk memberi maklumat' kepada pihak berkuasa tidak dibuktikan; (d) pihak pendakwaan gagal membuktikan bahawa organisasi yang dikenali sebagai 'Ikhwah Anshar Daulah Islamiyah' adalah organisasi pengganas; dan (e) sumpah 'Baiah' yang disiarkan dalam *chat group* tersebut bukan sumpah yang sah dan oleh itu

tuduhan bahawa perayu memberi sokongan kepada kumpulan pengganas tidak berasas.

Diputuskan, mengesahkan sabitan bagi tuduhan pertama dan tuduhan ketiga, mengenepikan sabitan bagi tuduhan kedua dan mengurangkan hukuman pemenjaraan bagi tuduhan pertama dan tuduhan ketiga dari 12 tahun kepada sepuluh tahun:

(1) Hakim Mahkamah Tinggi yang bijaksana telah mengarahkan dirinya dengan betul dengan merujuk kepada preseden yang telah mapan bahawa pernyataan tidak bersumpah yang tidak dikenakan pemeriksaan balas tidak boleh diberi pemberatan yang sama dengan keterangan bersumpah. Hakim Mahkamah Tinggi yang bijaksana telah memberikan pemberatan yang setimpal ke atas pernyataan tidak bersumpah dengan melihat kepada keterangan lain di dalam kes. Pembelaan perayu bahawa telefon bimbitnya hilang dan atau ianya digodam tidak dikemukakan sehinggalah perbicaraan bermula. Fakta ini menyentuh isu kredibiliti pembelaan dan pemberatan yang harus diletakkan pada pernyataan tidak bersumpah tersebut. Dalam kes ini, pihak pendakwaan telah membuktikan bahawa 'Mustidan Di' adalah perayu melalui keterangan ST1, keterangan pegawai Maxis dan Celcom dan penemuan nama akaun *Telegram* 'Musdetitan' di dalam telefon bimbit yang dirampas dari perayu. Berdasarkan dapatan tersebut, kelalaian pihak pendakwaan untuk memasukkan keterangan pakar mengenai pengoperasian teknikal aplikasi *Telegram* tidak menimbulkan kelompongan dalam kes pendakwaan (lihat perenggan 25–29).

(2) 'Sokongan' untuk kumpulan pengganas atau pelakuan tindakan pengganas didefinisikan secara meluas dalam s 130J Kanun Keseksaan. Dalam kes ini, setelah salah seorang anggota *chat group* tersebut dengan bangganya menyiarkan berita mengenai kejayaan melakukan tindakan ganas bagi tujuan keganasan, perayu mencadangkan pelakuan tindakan ganas selanjutnya. Atas sebab itu, walaupun tidak ada bukti keterlibatan perayu dalam serangan bom Movida, tindakannya untuk mencadangkan serangan selanjutnya jelas termasuk dalam definisi luas 'memberi sokongan' untuk pelaksanaan tindakan pengganas (lihat perenggan 30–31).

(3) Tuduhan ketiga menyatakan bahawa perayu melakukan kesalahan antara bulan Mac dan Jun 2016, iaitu sebelum s 13(1) Kanun Tatacara Jenayah yang dipinda berkuatkuasa. Oleh itu, peruntukan baru tidak dapat membantu pihak pendakwaan dalam kes ini untuk menetapkan elemen 'terikat secara sah'. Hakim Mahkamah Tinggi yang bijaksana bergantung pada ss 3(3) dan 20(3)(a) dan (b) Akta Polis 1967 (Disemak 1988) kerana perayu adalah seorang polis tetapi dalam kes ini, tidak ada keterangan yang diserahkan yang menunjukkan bahawa perayu yang merupakan

A mekanik polis ditugaskan untuk mengumpul maklumat mengenai kes-kes keganasan. Oleh itu, dia tidak berkewajipan untuk melaporkan maklumat yang didapatinya sebagai anggota *chat group* tersebut kepada orang atasannya. Berdasarkan dapatan tersebut, sabitan di bawah s 130M Kanun Keseksaan tidak dapat dipertahankan (lihat perenggan 38–40).

B (4) Tidak ada kesalahan dalam dapatan fakta hakim Mahkamah Tinggi yang bijaksana bahawa Ikhwah Anshar Daulah Islamiyah adalah kumpulan pengganas. Dia mendasarkan dapatannya pada keterangan pendapat SP7 dan inferens yang dibuat berdasarkan sifat perbincangan dalam *chat*
C *group* tersebut. SD3 yang bekerja di universiti yang sama dengan SP7 memberitahu mahkamah bahawa SP7 tidak mengajar kursus yang dikenali sebagai 'Revealed Knowledge and Human Science' tetapi isu ini tidak pernah dinyatakan oleh pihak pembelaan kepada SP7 setiap kali dia diperiksa semula. Oleh itu, hakim Mahkamah Tinggi yang bijaksana
D tidak terkhilaf dalam menolak keterangan ini (lihat perenggan 45).

(5) Tidak terdapat kesalahan dalam keputusan hakim Mahkamah Tinggi yang menerima pendapat SP7 berbanding pendapat SD4. Hakim Mahkamah Tinggi mempertimbangkan pengalaman SP7 dalam
E mengkaji 'Islamic State' dan Ikhwah Anshar Daulah Islamiyah dan hakikat bahawa dia diberi akses menyeluruh ke atas cetakan perbualan dalam *chat group* tersebut. Oleh itu, SP7 berada dalam posisi yang lebih baik untuk mengetahui niat anggota-anggota yang menyiarkan sumpah 'baiah' dalam talian ketika dia menyiapkan laporan pakarnya.
F Sebaliknya, SD4 hanya memiliki akses keatas kertas pertuduhan dan tidak berkesempatan untuk mengkaji percakapan dalam *chat group* tersebut (lihat perenggan 46).

(6) Kesalahan jenayah yang dinyatakan dalam pertuduhan ketiga adalah bahawa perayu memberikan 'sokongan' kepada organisasi pengganas.
G Sekiranya seseorang mengambil sumpah 'baiah' dan menganggap dirinya terikat untuk setia kepada organisasi pengganas, dia telah melakukan kesalahan di bawah s 130J(a) Kanun Keseksaan. Telah menjadi undang-undang yang mantap bahawa niat adalah permasalahan inferens.
H Dalam kes ini, perayu menyiarkan sumpah 'baiah' yang panjang ketika perbincangan mengenai pengumpulan dana untuk 'Islamic State' dan Ikhwah Anshar Daulah Islamiah. Oleh itu, perayu dengan jelas membuktikan niatnya untuk menyokong organisasi pengganas tersebut dengan menyiarkan sumpah 'baiah'. Oleh itu, kesahan sumpah 'baiah' dari sudut perundangan atau amalan Islam bukanlah unsur penting bagi
I kesalahan ini. Tetapi hakikat bahawa seseorang menganggap dirinya terikat dengan sumpah 'baiah' adalah unsur penting. Oleh yang demikian, tidak ada kesalahan dalam dapatan fakta hakim Mahkamah Tinggi yang bijaksana bahawa sumpah 'baiah' yang disiarkan oleh perayu merupakan sokongan kepada Ikhwah Anshar Daulah Islamiyah yang

merupakan kumpulan pengganas (lihat perenggan 47).

(7) Faktor-faktor mitigasi yang dikemukakan bagi pihak perayu telah tidak dipertimbangkan. Selanjutnya, dalam jadual yang menunjukkan trend hukuman untuk kesalahan s 130J(1)(a) yang dikemukakan oleh pihak pendakwaan, hukuman yang ditetapkan adalah di antara lapan tahun penjara hingga sepuluh tahun penjara. Berdasarkan dapatan tersebut, mahkamah mengurangkan hukuman penjara bagi pertuduhan pertama dan pertuduhan ketiga dari 12 tahun kepada sepuluh tahun (lihat perenggan 49).]

Cases referred to

Jusninawati bt Abdul Ghani v PP [2020] 1 MLJ 1; [2019] 10 CLJ 589, FC (folld)
Mohamed Salleh v PP [1969] 1 MLJ 104, FC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001
Criminal Procedure Code s 13(1)
Penal Code ss 130B, 130G(c), 130J, 130J(1)(a), (1)(b), (2), 130JA, 130M, Chapter VIA
Police Act 1967 ss 3(3), 20(3), (3)(a), (3)(b)
Security Offences (Special Measures) Act 2012 ss 6, 14

Appeal from: Criminal Trial No 46(SO)-4–11 of 2016 (High Court, Kuala Lumpur)

Syahredzan Johan (Ramrais & Partners) for the appellant.
Samihah bt Rhazali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ravinthran JCA:

INTRODUCTION

[1] The appellant was charged with committing three offences relating to terrorism. The charges read as follows:

First Charge

Bahawa kamu pada 28 Jun 2016, jam lebih kurang 6.44 pagi, di Ibu Pejabat Polis Daerah Kuala Muda, Sungai Petani, dalam daerah Kuala Muda, dalam negeri Kedah, dengan pengetahuan, telah memberi sokongan kepada berlakunya perbuatan pengganas yang melibatkan penggunaan bahan letupan melalui aplikasi Telegram di dalam kumpulan perbualan 'Amanah(phb) v Pas (ID: 143486835)' dengan menggunakan nombor telefon 013-283 9894 milik kamu sepertimana di

LAMPIRAN; dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah s 130J(1)(b) Kanun Keseksaan yang boleh dihukum di bawah peruntukan yang sama.

Second Charge

Bahawa kamu di antara 30 Mac 2016 hingga 29 Jun 2016, di Ibu Pejabat Polis Daerah Kuala Muda, Sungai Petani, dalam daerah Kuala Muda, dalam Negeri Kedah, yang mempunyai sebab untuk mempercayai bahawa kesalahan-kesalahan di bawah s 130G(c) Kanun Keseksaan, s 130J(1)(a) Kanun Keseksaan dan seksyen 130J(1)(b) Kanun Keseksaan telah dilakukan, dengan sengaja meninggalkan daripada memberi apa-apa maklumat berkenaan dengan kesalahan-kesalahan itu, yang kamu terpaksa memberi di sisi undang-undang, dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s 130M Kanun Keseksaan.

Third Charge

Bahawa kamu pada 30 Mac 2016 jam lebih kurang 12.25 pagi, di Ibu Pejabat Polis Daerah Kuala Muda, Sungai Petani, dalam daerah Kuala Muda, dalam negeri Kedah, dengan pengetahuan telah memberi sokongan kepada Kumpulan Pengganas Islamic State dengan cara melakukan sumpah setia (berbai'ah) seperti di LAMPIRAN, melalui aplikasi Telegram di dalam kumpulan perbualan 'gagak hitam (ID: 146761651)' dengan menggunakan nombor telefon 013-283 9894 milik kamu; dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah s 130J(1)(a) Kanun Keseksaan yang boleh dihukum di bawah peruntukan yang sama.

[2] He claimed trial to all three charges. The trial was conducted under the Security Offences (Special Measures) Act 2012 (Act 747). At the end of the case, the appellant was convicted on all three charges. He was sentenced to 12 years imprisonment for each of the three charges. All the terms of imprisonment were ordered to run concurrently.

THE PROSECUTION'S CASE

[3] The appellant was a serving policeman at the material time. The offences were allegedly committed by him in the course of chatting on the social media application known as *Telegram*. This application can be used on a handphone.

[4] The main witness for the prosecution was ST1. The trial court granted 'protected witness' status to him under s 6 of the Security Offences (Special Measures) Act 2012 (Act 747). He became a member of a secretive chat group on *Telegram* which was named 'Gagak Hitam'. The group had 45 members including the appellant and ('ST1'). All the members were added by the administrator of the group who used the nickname 'Akhi Wandy'. His real name was Mohammad Wandy bin Mohamed Jedi. He was an operative of the terrorist group known as the 'Islamic State' and was based in Syria. ST1

preserved all the conversations between the members in this chat group. It was printed and tendered in court. The High Court judge noted that the members actively discussed various terrorism related topics such as becoming a terrorist on social media platform, making bombs, starting an insurrection in Malaysia, blowing up police stations and the like. The members also shared 'Islamic State' news and propaganda material on the chat group.

[5] After the arrest of some members by the police, Akhi Wandy shut down the 'Gagak Hitam' chat group and started a new one with the name of 'Amanah (Phb) v Pas'. He added the former members of the 'Gagak Hitam' chat group. These included ST1 and the appellant. The members discussed similar terrorism related topics as before and shared 'Islamic State' news and propaganda material. Again, ST1 diligently saved and preserved the conversations on the 'Amanah (Phb) v Pas' chat group on his hand phone and made them available to the police. Importantly, ST1 also provided the nicknames used by the members and their hand phone numbers to the police.

[6] The first charge and third charge in this case pertain to the conversations posted by one who used the nickname 'Mustidan Di'. The hand phone number of 'Mustidan Di' was 013–2839894. SP5 who is from the Maxis telecommunication's company testified that the appellant was registered user of the said hand phone number between 24 December 2015 and 3 May 2016. SP8 from the Celcom telecommunications company testified that the appellant was the registered user from 3 May 2016 to 11 November 2016.

[7] The backdrop to the incriminating posting in question that is subject matter of the first charge is as follows. Akhi Wandy announced that a night club known as Kelab Movida in Puchong was bombed. Immediately, many of the members applauded the act of terrorism. Akhi Wandy also posted a photograph of the night club that was taken in the aftermath of the bombing. The appellant's contribution to the thread of conversation in which the members approved the bombing of the night club was that he suggested that an attack be carried out on gambling establishments. He said as follows:

> Kita serang rumah tokey judi nak?

[8] Prior to that posting, the appellant had identified with the cause of the members who freely discussed support for the 'Islamic State' terrorist group as he warned members to be careful about using the *WhatsApp* social media chat group. The reason is that he received information that it can be monitored by the Special Branch of the Police Force. He told them that unlike *WhatsApp* conversations, *Telegram* conversations cannot be monitored.

[9] It must be noted that the appellant is a uniformed member of the Police

Force although he works as a mechanic. The evidence of ST1 is that the appellant is privy to the discussion of the members in relation to the expression of support for terrorist acts. The second charge against the appellant is that he intentionally omitted to give information to authorities respecting offences under ss 130G(c), 130J(1)(a) and 130J(1)(b) of the Penal Code.

[10] The appellant also posted an oath of allegiance known as 'Baiah' in Arabic pledging loyalty to the 'Ikhwah Anshar Daulah Islamiyah' group on the chat group. This is the subject matter of the third charge.

ARGUMENTS OF DEFENCE AT CLOSE OF CASE FOR PROSECUTION

[11] Counsel for appellant argued that the application for 'protected status' witness for ST1 should have been made in the course of the trial and not before. The defence in respect of the charges were as follows. The appellant had no prior knowledge of the Movida night club bombing. There was no evidence that the 'Ikhwah Anshar Daulah Islamiyah' was *gazetted* as terrorist organisation. The appellant was not aware that the terrorism offences stated in the second charge were committed and that in any event he was not bound to disclose any information as he was only a police mechanic. The final argument was that SP7 who was the prosecution's expert on Islamic terrorist organisations was not a competent witness.

FINDINGS OF HIGH COURT JUDGE AT THE END OF THE PROSECUTION'S CASE

[12] The learned High Court judge firstly found that the appellant was 'Mustidan Di' in the chat group in question. He made this finding based on the evidence of the SP5 ('the Maxis officer') and SP8 ('the Celcom officer'). These witnesses testified that during the period when the hand phone number of 'Mustidan Di' was registered with their telecommunication companies, no other person could become the registered user of the same hand phone number. They also testified that it is not possible to have two 'sim cards' in respect of the same hand phone number. The other evidence that the learned High Court judge considered was that the hand phone bearing the said number was found in possession of the appellant.

[13] In respect of the first charge, the High Court judge made the following finding. The learned High Court judge accepted the evidence of ST1 that the appellant suggested an attack on gambling establishments. The suggestion in question (*Kita serang rumah tokey judi nak*?) was posted on the chat group at the time when other members applauded the terrorist attack on the Movida night club. Therefore, the learned High Court judge found that the act of the

appellant in advocating an attack on gambling establishments constituted giving support for the commission of a terrorist act under s 130J(1)(b).

[14] In respect of the second charge, the learned High Court judge made the following finding. The conversations in the chat group was saved and supplied to the police by ST1. The printout of the same showed that the chat group members discussed soliciting donations to support the cause of the 'Islamic State' terrorist group. This is an offence under s 130G(c) of the Penal Code. As we said earlier, the members also applauded the commission of terrorist acts such as the bombing of the Movida night club and discussed soliciting or giving support to the 'Islamic State' terrorist group. Their actions constitute an offence under s 130J1(a) or (b) of the Penal Code. The appellant was a policeman who worked as a mechanic at the District Police Headquarters in Kuala Muda. He never passed on the information about the offences committed by the members of the chat group to his supervisor or to the Special Branch at the District Police Headquarters. The learned High Court judge found that he intentionally omitted to give information respecting the said offences which he was legally bound to give under s 130M of the Penal Code.

[15] The findings of the High Court judge in respect of the third charge are as follows. In the printout of the chat group conversations, it appeared that 'Mustidan Di' who is the appellant posted a form of oath known as 'baiah' in Arabic on the chat group. He swore allegiance to an organisation known as 'Ikhwah Anshar Daulah Islamiyah'. An expert witness in the person of Ustaz Ahmad EL Muhammady ('SP7') testified that the said oath is valid as it was made in the name of God and that it bound the maker of the oath. SP7 is a lecturer at the International Islamic University in Malaysia. He specialises in Islamic Studies and Political Science. He has also conducted extensive studies on extremist and militant organisations. He has previously given evidence in terrorism cases in Malaysian courts and his evidence had been accepted. Although the 'Ikhwah Anshar Daulah Islamiyah' is not *gazetted* as a terrorist organisation, SP7 said that it is a terrorist organisation as it actively supports the violent acts of the 'Islamic State' which is a terrorist organisation. He said 'Ikhwah Anshar Daulah Islamiyah' means 'brothers who support the Islamic State'. The learned High Court judge accepted his expert opinion after considering the qualifications and experience of SP7. In the premises, he found that there was prima facie evidence that the appellant committed the offence of giving support to a terrorist organisation by swearing an oath of allegiance to it.

[16] In respect of the challenge to the grant of 'protected witness' status to ST1 because the inquiry under s 14 of the SOSMA was conducted before the trial proper commenced, the learned High Court judge found that it did not prejudice the defence as the counsel for appellant or the appellant have no right to be present during the inquiry.

[17] In the result, the learned High Court judge called the appellant to enter his defence on all three charges.

THE DEFENCE

[18] The appellant elected to give an unsworn statement from the dock. He read out a written statement. His defence was one of total denial. He said that between February and April of 2016, he lost two of his hand phones and the respective sim cards with the numbers 017–328 9894 and 013–283 9894. He obtained a new sim card with the hand phone number 013–2839894. He also changed his telecommunications provider from Celcom to Maxis. Between March and June of the same year, he received many notifications and messages from an unknown telegram chat group. He left the chat group as he thought that the group had something to do with foreign exchange matters. He denied being a member of the *Telegram* chat group known as 'Amanah (Phb) v Pas'. He said he was not involved with the 'Islamic State' and that he never swore allegiance to it. He believed that his hand phone was hacked as he received a 'Google' notification via email.

[19] The appellant called his wife (SD2) and two lecturers (SD3 and SD4) from the International Islamic University to testify on his behalf. SD2 told the court that the appellant was involved in forex trading. SD3 told the court that SP7 did not teach a course known as 'Revealed Knowledge and Human Science' at the International Islamic University as the latter had claimed. As for SD4, he stated that in his opinion the online posting of the 'baiah' oath is not valid as it was not made in person to a representative of the Caliph. He contradicted the expert opinion of SP7.

DECISION OF HIGH COURT AT END OF CASE FOR DEFENCE

[20] The learned High Court judge found that the unsworn statement of the appellant and the sworn testimony of his three witnesses did not raise reasonable doubt in the prosecution's case. Briefly stated, his reasons are as follows.

[21] His Lordship disbelieved the defence of the accused that he had lost his two hand phones as he never disclosed this pertinent fact to the investigating officer after his arrest. The investigating officer was not even cross-examined about the loss of the appellant's hand phones. At the trial, counsel for accused only cross-examined the Celcom and Maxis officers about the possibility of the hand phone being hacked. The appellant's wife also did not say that her husband lost his two hand phones during the material time. Neither did counsel for the appellant question her about it. The appellant tendered a 'google notification' that there was a sign-in to his account. The learned High

Court judge held that this was merely a general notification and that the investigating officer or other prosecution witnesses were not examined about this notification.

[22] In respect of the validity of the 'baiah' oath, the learned High Court judge accepted the expert opinion of SP7 who emphasized the importance of the intention of the individual although the oath was posted online and was not taken in the presence of the representative of the Caliph. His Lordship noted that SP7's evidence on this very point had been previously accepted by the court in another terrorism case. He also found it significant that the administrator of the chat group in question at the material time was Akhi Wandy who was a well-known supporter and operative of Islamic State terrorist group in Syria.

ISSUES IN THE APPEAL

[23] Counsel for the appellant canvassed the following broad issues in respect of the conviction on the three charges:

(a) identity of appellant;

(b) support for commission of a terrorist act;

(c) obligation to give information to authorities; and

(d) whether 'baiah' constitutes support?

IDENTITY

[24] Counsel for the appellant argued that the prosecution failed to prove that 'Mustidan Di' in the 'Amanah (Phb) v Pas' chat group is the appellant. The learned High Court judge decided that 'Mustidan Di' was the appellant based the testimony of ST1 and two officers from Celcom and Maxis. Counsel for the appellant submitted that sufficient consideration was not given to the unsworn statement of the appellant that he lost his two hand phones between February and April of 2016 and that his hand phone was hacked. We find no merit in this submission for the following reasons.

[25] We firstly note that the learned High Court judge correctly directed himself by referring to well established precedents that an unsworn statement which is not subject to cross-examination cannot be given the same weight as sworn testimony. We shall cite one of the precedents here. In the case of *Mohamed Salleh v Public Prosecutor* [1969] 1 MLJ 104, the former Federal Court approved the following direction to the jury in respect of the weight to be given to an unsworn statement:

> Members of the Jury, you will naturally not be inclined to give so much weight to

A what he said in the dock as you would if he gave evidence because when a man gives evidence one can cross-examine on it and test it and generally have a much better opportunity of assessing it. *Of course, you must not reject the statement of the accused, you must consider it and give it such weight you think it is worth having regard to the other evidence that you have.* (Emphasis added.)

B

In accordance with the above direction, the learned High Court judge did not simply brush aside the unsworn statement of the appellant. Instead, he endeavoured to give it such weight as it deserved by looking at other evidence tendered in the case. This is apparent from the following passages of the
C judgment:

[67] Sehubungan itu, dapat dirumuskan daripada huraian nas undang-undang yang dinyatakan, bahawa nilai kenyataan tertuduh dari kandang salah adalah rendah tetapi *masih boleh diterima* jika kenyataan tersebut kukuh atau disokong
D dengan keterangan kukuh yang lain.

[68] Pertimbangan mahkamah dalam kes ini adalah sama ada keterangan tertuduh yang diberikan secara tidak bersumpah adalah kukuh dan keterangan sokongan daripada SD2, SD3 dan SD4 adalah juga kukuh yang menyokong keterangan tertuduh. (Emphasis added.)

E

[26] The defence of the appellant in the unsworn statement was that he had lost his two hand phones and he denied being the member known as 'Mustidan Di' in the 'Amanah (Phb) v Pas' *Telegram* chat group. As correctly noted by the learned High Court judge, this defence was not only contradicted by the
F evidence of the prosecution but it was not corroborated by the evidence of the SD2 who is the wife of the appellant. There is no evidence that the defence that the appellant lost his hand phones was disclosed to the investigating officer. Thus, the investigating officer had no opportunity to investigate the said allegation. Similarly, there is no evidence that the defence of the appellant that
G his hand phone was hacked was disclosed to the investigating officer. The possibility that the hand phone could have been hacked was put to the Maxis officer only during cross-examination. Thus, the appellant's defence that the hand phones were lost and or they were hacked was kept up his sleeve until the trial commenced. This fact goes to the issue of the credibility of the defence and
H the weight that should be attached to the unsworn statement. The appellant's own wife (SD2) also did not say in her evidence that her husband lost his hand phones. Again, the opportunity to corroborate the unsworn statement on this point was not availed.

I **[27]** Furthermore, evidence tendered by prosecution pointed to the fact that the appellant was 'Mustidan Di'. The investigating officer testified that a hand phone that used the number 013–2839894 was seized from the appellant at the time of arrest. This was the phone number that was used by 'Mustidan Di' in the 'Amanah (Phb) v Pas' chat group according to ST1. The said chat group had

been deleted from *Telegram* application by that time. However, the investigating officer discovered that the *Telegram* application used the name nickname 'Mudetitan'. This discovery supports the case of the prosecution that the appellant and 'Mustidan Di' in the 'Amanah (Phb) v Pas' chat group are one and the same person for the following reason. In the 'baiah' oath that was printed out from the chats that were saved by ST1, 'Mustidan Di' referred to himself as 'Mudetitan'. Part of the 'baiah 'oath reads as follows:

> Mustidan Di
>
> Saya *Musdetitan* Bersumpah Demi Allah tidak akan berkhianat kepada Ikhwah Anshar Daulah Islamiyah di manapun berada, siap menerima azab dari Allah, & tdk diterima bumi bila saya berkhianat & saya memberikan informasi penting kepada *thaghut* ... (Emphasis added.)

[28] Thus, the fact that the *Telegram* account name *Musdetitan* was found on the very hand phone seized from the appellant lends credence to the evidence of the prosecution that 'Mustidan Di' was the appellant. Assuming that it is true that the appellant lost his previous handphones or that they were hacked, there is no explanation for the existence of the Telegram account with the name 'Musdetitan' on the hand phone seized from him. For all the above reasons, the learned High Court judge's decision not to attach much weight to the unsworn statement of the appellant cannot be faulted. The argument that the learned High Court judge did not consider the unsworn statement at all is without basis either.

[29] Counsel for the appellant also submitted that the chat printout sourced from ST1 should not be given weight as expert testimony on the workings of the *Telegram* application was not tendered by the prosecution. He said that only evidence of the contents of the hand phone and the sim card seized from the appellant was tendered. We find no merit in the submission for the following reason. The main ingredient that the prosecution was required to prove in this case was that the person who used the nickname 'Mustidan Di' in the *Telegram* chat group in question is actually the appellant. The prosecution proved this ingredient through the evidence of ST1, the evidence of the Maxis and Celcom officers and the discovery of the *Telegram* account name 'Musdetitan' in the hand phone seized from the appellant. In the premises, we fail to see if any gap has been occasioned by the omission of the prosecution to call expert evidence on the technical workings of the *Telegram* application.

SUPPORT FOR COMMISSION OF TERRORIST ACT

[30] Counsel for the appellant argued that the *Telegram* user 'Mustidan Di' did not give support for the bombing of the Movida night club in Puchong for the following reason. 'Mustidan Di' posted the comment 'Kita serang rumah tokey judi nak?' only after Telegram user 'Black Arrow' reported the bombing

of the said night club in the chat group. The argument is that the comment of 'Mustidan Di' did not constitute support for the bombing of the night club and that the learned High Court judge erred in law in drawing the inference that it did. With respect, we disagreed with the counsel for the appellant for the following reasons. 'Support' for a terrorist group or the commission of a terrorist act is defined very widely in s 130J of the Penal Code. Subsection (2) of the provision reads as follows:

> 130J(2) For the purposes of subsection (1), 'support' includes —
>
> (a)–(j)
>
> (k) *using social media* or any other means to —
>
> (i) *advocate for or to promote a terrorist group, support for a terrorist group or the commission of a terrorist act; or*
>
> (ii) further or facilitate the activities of a terrorist group. (Emphasis added.)

[31] In the instant case, after one member of said chat group gleefully posted news about the successful commission of a violent act in the name of a terrorist cause, the appellant advocated the commission of further violent acts. In the premises, although there was no evidence of the involvement of the appellant in the Movida bomb attack, his act in advocating further attacks clearly comes with the wide definition of 'giving support' for the commission of terrorist acts.

OBLIGATION TO GIVE INFORMATION TO AUTHORITIES

[32] The above issue pertains to the second charge. The appellant was charged with intentionally omitting to give information which he was legally bound to give in respect of three terrorism related offences that he had reason to believe had been committed. Section 130M criminalises the omission to give information about the said offences. The provision reads as follows:

> Whoever knowing or having reason to believe that any offence punishable under sections 130C to 130L has been or will be committed intentionally omits to give any information respecting that offence, which he is *legally bound to give*, shall be punished with imprisonment for a term which may extend to seven years or with fine or with both. (Emphasis added.)

[33] The prosecution's case was that the appellant who was a member in the 'Amanah (Phb) v Pas' Telegram chat group had reason to believe that terrorism related offences had been committed because the members discussed raising funds for the Islamic State, supported and applauded terrorist acts and swore allegiance to Ikhwah Anshar Daulah Islamiyah which is a proxy of the Islamic State. In the written submission, counsel for appellant argued that it is 'too simplistic' to assume that the appellant had reason to believe that terrorism related offences had been committed by merely being a member of the said

Telegram chat group. During oral argument, counsel for the appellant also submitted that the element of the offence that the appellant was 'legally bound to give information' to the authorities was not proved.

[34] We find no merit in the submission that the appellant had no reason to believe that terrorism offences had been committed by the members of the 'Amanah (Phb) v Pas' chat group. The printout of the chat showed that the members had avidly discussed raising funds for the Islamic State and had also expressed support for the commission of violent terrorist acts. It was proven through the evidence of ST1 and the telco officers from Celcom and Maxis that the appellant was privy to this chat.

[35] However, in the light of the recent Federal Court judgment of *Jusninawati bt Abdul Ghani v Public Prosecutor* [2020] 1 MLJ 1; [2019] 10 CLJ 589 which was not available at the time of the trial, we found merit in the submission that the appellant was not 'legally bound' to give information to the authorities.

[36] In Chapter VIA of the Penal Code which addresses terrorism related offences, there is no provision that imposes a duty on the public to give information pertaining to commission of the said offences. However, s 13(1) of the Criminal Procedure Code imposes a duty on every person who is aware of the commission of or the intention of any other person to commit any offence punishable under the Penal Code or any other written law. This provision came into its present form when the Criminal Procedure Code was amended by Act A1521 on 23 December 2016. It came into force on 1 March 2017 via PU(B) 122. The old s 13(1) of the Criminal Procedure Code imposed a duty on the public to give information in respect of only offences that were enumerated in that provision. Terrorism related offences found in Chapter VIA of the Penal Code were not listed in the old s 13(1).

[37] In *Jusninawati bt Abdul Ghani v Public Prosecutor*, the appellant was a policewomen who was not tasked with intelligence gathering duties. The prosecution proved during the trial the appellant knew that an acquaintance of hers planned to travel to Syria to join the Islamic State. This is an offence under s 130JA of the Penal Code. The appellant was charged with not reporting this information to her superiors under s 130M of the Penal Code. She was convicted in the High Court and the decision was affirmed by the Court of Appeal. At the Federal Court, it was held that the amendment to s 13(1) of the Criminal Procedure Code which replaced the list of reportable offences to 'any offence under the Penal Code or any other written law' has no retrospective effect. Mohd Zawawi Salleh FCJ, speaking for the Federal Court, said as follows:

[28] In our considered view, unless the contrary intention appears, Parliament

could not have intended under the old s 13(1)(a) of the CPC to impose a legal obligation on persons to furnish information in respect of the possible commission of s 130JA offence. On that score, we were in agreement with the Court of Appeal that the learned JC had erred in his reliance on the old s 13(1)(a) of the CPC. In light of above discussion, it was our considered view that the prosecution of the appellant for not reporting the possible commission of s 130JA offence by SP1 and 'Abu Kedah', under s 130M of the Penal Code was unsustainable in law.

[38] In the instant case, the third charge states that the appellant committed the offence between March and June of 2016, that is, before the amended s 13(1) of the Criminal Procedure Code came into force. Therefore, the new provision cannot aid the prosecution in this case to establish the element of 'legally bound'. The Federal Court in the above mentioned case emphatically stated that there is no obligation to give information in respect of an offence not stated in the old s 13(1) of the Criminal Procedure Code. The relevant passages reads as follows:

> [26] So too here. The old s 13(1)(a) of the CPC imposes a duty on every person, including the appellant, who is aware of the commission of the offence enumerated in that section, to give information to the nearest police station or police officer or *penghulu*. Once there is an omission, such persons become criminally liable. Certain offences are mentioned in s 13(1)(a) of the CPC, but it does not refer to the offence of travelling to a foreign country to commit terrorist acts under s 130JA of the PC, with which we are concerned here. Thus, the appellant was not obliged to report the information concerned.
>
> [27] It is a well-established principle of statutory interpretation that Parliament is not presumed to have intended to limit or interfere with the personal liberty of a citizen, unless it indicates this intention in clear, unmistakable and unambiguous terms. It is trite that criminal and penal statutes must be strictly construed, that is, they cannot be enlarged or extended by intendment, implication, or by any equitable considerations. In other words, the language cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purpose for which the statute was enacted. Therefore, no act or omission is to be deemed criminal unless it is clearly made so by words of the statute concerned (see *Maxwell on Interpretation of Statutes* (12th Ed) at pp 239–240 and *Craies on Statute Law* (7th Ed) at p 529).
>
> [28] In our considered view, unless the contrary intention appears, Parliament could not have intended under the old s 13(1)(a) of the CPC to impose a legal obligation on persons to furnish information in respect of the possible commission of s 130JA offence. On that score, we were in agreement with the Court of Appeal that the learned JC had erred in his reliance on the old s 13(1)(a) of the CPC. In the light of above discussion, it was our considered view that the prosecution of the appellant for non-reporting the possible commission of s 130JA offence by SP1 and 'Abu Kedah', under s 130M of the Penal Code was unsustainable in law.

[39] We are mindful that in the instant case, the learned High Court judge

did not say that he was applying the new s 13(1) of the Criminal Procedure Code retrospectively to the facts of this case. The learned High Court judge instead relied on ss 3(3) and 20(3)(a) and (b) of the Police Act 1967 (Revised 1988) as the appellant was a policeman. The above mentioned provisions refer to the general duties of the Police Force and its members. They read as follows:

> 3(3) The Force shall subject to this Act be employed in and throughout Malaysia (including the territorial waters thereof) for the maintenance of law and order, the preservation of the peace and security of Malaysia, the prevention and detection of crime, the apprehension and prosecution of offenders and the collection of security intelligence.
>
> 20(3) Without prejudice to the generality of the foregoing provisions or any other law, it shall be the duty of a police officer to carry out the purposes mentioned in subsection 3(3); and he may take such lawful measures and do such lawful acts as may be necessary in connection therewith, including —
>
> (a) apprehending all persons whom he is by law authorised to apprehend;
>
> (b) processing security intelligence;
>
> (c)–(m).

[40] However, in *Jusninawati bt Abdul Ghani v Public Prosecutor*, the Federal Court also dismissed the argument that ss 3(3) and 20(3) of the Police Act 1967 was applicable as the appellant was not involved in intelligence gathering work in relation to terrorism cases. Similarly, in the instant case, no evidence was tendered to the effect that the appellant who is a police mechanic was tasked with gathering intelligence about terrorism cases. Therefore, he had no duty to report information that he was privy to by virtue of being a member of the 'Amanah (Phb) v Pas' chat group to his superiors. In the premises, the conviction under s 130M charge cannot be sustained.

'BAIAH'

[41] In respect of the oath of allegiance which is the subject matter of the third charge, counsel for appellant firstly argued the prosecution failed to prove that organisation known as 'Ikhwah Anshar Daulah Islamiyah' is a terrorist organisation. Secondly, he argued that the oath was posted on the chat group is not a valid oath and therefore the charge that the appellant gave support to a terrorist group is baseless. We found no merit in the above arguments. Our reasons are as follows.

[42] Section 130B defines a terrorist group as follows:

> (a) an entity that has as one of its activities and purposes the committing of, or the facilitation of the commission of, a terrorist act; or
>
> (b) *a specified entity* under section 66B or section 66C of the *Anti-Money

Laundering and Anti-Terrorism Financing Act. (Emphasis added.)

[43] Unlike the Islamic State which is *gazetted* as a 'specified entity' under the Anti-Money Laundering and Anti-Terrorism Financing Act (Act 613), the group known as 'Ikhwah Anshar Daulah Islamiyah' is not so *gazetted*. However, the prosecution tendered expert evidence through SP7 to prove that it is nonetheless a terrorist organisation. We had earlier referred to the qualifications of SP7. He said that in his opinion 'Ikhwah Anshar Daulah Islamiyah' is a terrorist entity. The name of the group means 'Brothers who support the Islamic State'. The learned High Court judge accepted SP7 as an expert on the subject of terrorist groups and concluded that Ikhwah Anshar Daulah Islamiyah is a terrorist group. SP7 in his expert report stated that 'Ikhwah Anshar Daulah Islamiyah' is a proxy of the Islamic State. The relevant passage that was reproduced by the learned High Court Judge in his judgment was as follows:

> (2) Nama 'Ikhwah Anshar Daulah Islamiyah' membawa maksud saudara pembantu atau penyokong Daulah Islamiyah iaitu pembantu/penyokong Daulah Islamiyah ini biasa digunakan oleh beberapa kumpulan di Asia Barat, Eropah, Asia Tenggara untuk menunjukkan sokongan kepada B kumpulan Daulah Islamiyah (Islamic State atau ID/Daesh) di Syria dan Iraq. Bay'ah ini dibuat untuk menyahut seruan Abu Bakar al-Baghdadi, pemimpin tertinggi IS, supaya membantu perjuangan IS. Mengikut kenyataan Dabiq, edisi 1, seluruh umat Islam diseru untuk memberi bay'ah kepada Abu Bakar al-Baghdadi atau kepada kumpulan IS. Bay'ah ini wajib dari segi statusnya, mengikut kenyataan Dabiq kerana ia diseru oleh seorang Khalifah yang baru dilantik. Justeru, mana-mana kumpulan yang berada untuk menjadi proksi atau 'Ikhwah Anshar' (pembantu) Daulah Islamiyah, mereka boleh mengisytiharkan sokongan ini melalui bay'ah taat setia pada kumpulan IS.

[44] The learned High Court judge also gave consideration to the contents of the chat in 'Amanah (Phb) v Pas'. The members who are ardent supporters of the Islamic State and Ikhwah Anshar Daulah Islamiyah discussed giving support to the commission violent terrorist acts. For the above reasons, the learned High Court judge found that 'Ikhwah Anshar Daulah Islamiyah' is a terrorist group.

[45] We found no error in the finding of fact of the learned High Court judge that Ikhwah Anshar Daulah Islamiyah is terrorist group. He based his finding on the opinion evidence of SP7 and the inference he drew from the nature of the discussion in the chat group. SP7's evidence in respect of his experience in studying the Islamic State and Ikhwah Anshar Daulah Islamiyah was challenged by counsel for the appellant. We stated earlier that SD3 who worked in the same university as SP7 told the court that the latter did not teach a course known as 'Revealed Knowledge and Human Science'. However, this issue was never put by the defence to SP7 whenever he was cross-examined. In the premises, in our view, this evidence was correctly discounted by the learned

High Court judge. Even if it were otherwise, the fact remains that SP7 had conducted extensive research into Islamic State and Ikhwah Anshar Daulah Islamiyah terrorist groups.

[46] In respect of the oath of allegiance to Ikhwah Anshar Daulah Islamiyah, the expert called by the appellant, namely SD4, stated that in his opinion the oath is not valid as it was not made in person before a representative of the Caliph. However, the learned High Court judge accepted the expert opinion of SP7 who said that it is the intention of the individual who takes the Islamic oath of allegiance that gives it validity and not the fact that it was made online or in cyberspace. Again, we see no error in the decision of the High Court judge who accepted the opinion of SP7 in preference to the opinion of SD4. The High Court judge took into account the experience of SP7 in studying the Islamic State and Ikhwah Anshar Daulah Islamiyah and the fact that he was given access to the entire printout of the conversations in 'Gagak Hitam' and 'Amanah (Phb) v Pas' *Telegram* chat group. Therefore, SP7 would have been in a better position to gauge the intention of the members who posted the online 'baiah' oath when he prepared his expert report. On the other hand, SD4 only had access to the charge sheet and had no opportunity to the study the conversations in the said chat groups.

[47] We also find that the opinion of SP7 is more relevant to the charge in question. The offence disclosed in the third charge is that the appellant gave 'support' to a terrorist organisation. We are of the view that if a person takes the 'baiah' oath and considers himself bound to give allegiance to a terrorist organisation, he has committed an offence under s 130J(a) of the Penal Code. It is trite that intention is a matter of inference. In the instant case, the appellant posted the lengthy 'baiah' oath in the midst of discussions about raising funds for the Islamic State and the Ikhwah Anshar Daulah Islamiah. Thus, the appellant clearly evinced his intention to support the said terrorist organisations by posting the 'baiah' oath. Therefore, the legality of the 'baiah' oath from the standpoint of Islamic jurisprudence or practice is not the essential ingredient of this offence. But the fact that one considers himself bound by the 'baiah' oath is the essential ingredient. We therefore found no error in the finding of fact of the learned High Court judge that the 'baiah' oath posted by the appellant constituted support for the Ikhwah Anshar Daulah Islamiyah which is a terrorist group.

CONCLUSION

[48] For all the above reasons, we found no merit in respect of the grounds of appeal pertaining to the conviction of the appellant on the first charge and third charge. We found the conviction to be safe and we affirmed it. However, as we said earlier, the conviction on the second charge cannot be sustained in

A view of the pronouncement by Federal Court on the meaning of 'legally bound' in s 130M of the Penal Code in *Jusninawati bt Abdul Ghani v Public Prosecutor*. In the premises, we set aside the conviction and sentence in respect of the second charge.

B **[49]** The appellant was sentenced to 12 years imprisonment each on the first charge and the third charge. The sentences were ordered to run concurrently. Counsel for the appellant argued that the sentence was excessive in all the circumstances of the case. The learned High Court judge mainly emphasised the fact that the appellant was police officer when he meted out the sentence of C 12 years imprisonment. Counsel for the appellant correctly submitted that the mitigating factors that were canvassed on behalf of the appellant were not given consideration. Furthermore, we noted that in the table reflecting the trend of sentencing for the s 130J(1)(a) offence that was tendered by the prosecution, the punishment ranged between eight years imprisonment to ten years D imprisonment. In the premises, we reduced the sentence of imprisonment of 12 years on the first charge and the third charge to ten years. We affirmed the order of the learned High Court judge that both sentences run concurrently.

E *Conviction on first charge and third charge affirmed; conviction on second charge set aside; sentence of imprisonment of 12 years on first charge and third charge reduced to ten years.*

Reported by Dzulqarnain bin Ab Fatar

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